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IN THE

Supreme Court of the United States

October Term, 1945.

No. 147

WADE H. COOPER, *Petitioner,*

v.

R. C. PARSONS, Receiver of The United States Savings Bank, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

WADE H. COOPER, *Pro Se,*
University Club,
Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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October Term, 1945.

No. .....

WADE H. COOPER, *Petitioner,*

v.

R. C. PARSONS, Receiver of The United States Savings Bank, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner, Wade H. Cooper, counterclaimant in the District Court of the United States for the District of Columbia, and Appellant in the United States Court of Appeals for the District of Columbia, respectfully prays that a writ of certiorari be issued to review a judgment of the said United States Court of Appeals for the District of Columbia, entered in this cause on March 12, 1945, affirming a judgment of the District Court of the United States for the District of Columbia, denying a motion by Petitioner as counterclaimant, for a summary judgment and granting a motion of Respondent as Plaintiff in the said District Court,

for a summary judgment. Petitioner, as Appellant in the said United States Court of Appeals, filed a Petition for a rehearing on March 24, 1945, which Petition was denied by said Court of Appeals on April 6, 1945.

This case grows out of the arbitrary suspension and liquidation of the United States Savings Bank, admittedly four times solvent, organized in 1906 under the laws of the State of West Virginia, with a capital stock of $100,000. of 1000 shares of $100.00 each, with its principal place of business at 14th & You Streets, Northwest, Washington, D. C. A conservator was placed in said bank on March 14th, 1933, following the bank moratorium of President Roosevelt on March 6, 1933. On February 10, 1934, former Comptroller J. F. T. O'Connor appointed a receiver for said Bank, which, in a composite period of 13 months (payment dates, R. p. 3), paid 100 per cent on the dollar and still has left over a surplus of $175,000, after a dissipation in alleged expenses of $235,000. The Bank was four times solvent as shown by the records, as the result of the self-denial of the stockholders in building up a surplus of twenty times the amount required by law (which was only 20% of the capital stock of $100,000), in order to protect the depositors and save the possibility of an assessment. The question finally to be determined is as to who is the owner of this surplus of $175,000, the stockholders or depositors; but this determination is dependent upon a number of other questions, subject to review by this Court, as set out in the Record in the substituted counterclaim (R. pp. 3-11), including the effect of *ultra vires* acts of the Bank, the rate of interest, if any, to be paid under the District law, and the effect of the arbitrary acts of the former Comptroller.

Opinion and Judgment Below.

The judgment and opinion of the District Court of the United States for the District of Columbia are printed in

the record or Appendix (R. 39 and 45 respectively). The judgment of the District Court was affirmed on March 12, 1945 by the Court of Appeals upon the opinion of Mr. Justice Letts of said District Court, the Court of Appeals not writing any opinion of its own.

Statement of the Case.

Carter B. Keene, first Receiver of the Savings Bank, refused to sue the stockholders upon the ground that the Bank was perfectly solvent, but he was later "permitted" to resign, and Receiver Young, predecessor of Respondent Parsons, on August 10, 1937 sued Petitioner and all other stockholders of the Bank for $100,000. assessment. On January 23, 1939 an amended bill was filed by the Receiver charging that 100 per cent had been paid on the principal of the depositors, but that interest was due amounting to the sum of $223,000, later admitted by Respondent to be approximately $204,000. Petitioner and the other stockholders contested this claim for interest for various reasons, and charged that the Bank was arbitrarily liquidated, citing facts and acts to sustain this latter charge. Different appeals were taken to the Court of Appeals by one side or the other until November 1943, when the minority stockholders agreed to settle by the payment of $13.25 per share, all the money to be restored if it should finally be determined that the Receiver was not entitled to the money or that it was not needed. On February 14, 1944, Petitioner Cooper, owner of 560 shares of the bank stock accepted the same proposition, with the understanding that he was not surrendering any rights and should have the right to have all questions in issue determined by the Courts (R. pp. 52, 53). Thereupon, on April 6, 1944, this substituted counterclaim was filed (R. 3-11).

Following the filing of this counterclaim, Respondent, on April 11, 1944, moved to strike certain portions of same,

which motion was granted on April 21, 1944 (R. p. 15). On April 28, 1944, Respondent filed answer to the remaining charges (R. p. 15). On May 4, 1944, Petitioner filed his motion for summary judgment (R. p. 27). On May 12, 1944, Respondent made his motion for a summary judgment, which was granted on June 23, 1944, and the motion of Petitioner denied (R. p. 45).

Basis of Ruling.

While the Court of Appeals did not deliver any written opinion, it adopted the opinion of the District Court (Mr. Justice Letts), and affirmed the judgment upon that opinion, as already stated (R. p. 39).

Questions Presented.

The questions involved in this proceeding are:

1. Whether the Savings Bank in the instant case is liable for its *ultra vires* acts.
2. Whether Petitioner is *estopped* as an officer and stockholder of the Bank from relying upon the *ultra vires* acts of the Bank.
3. Whether the law of the District of Columbia controls the rate of interest, if any, to be paid, or the law of New Jersey, Oregon, or some other State.
4. Whether the interest law of the District of Columbia was properly interpreted, construed and applied by the lower courts.
5. Whether the Savings Bank in the instant case is liable for interest at all, and if so, what rate under the law of the District of Columbia, and for what period.
6. Whether the failure of the Savings Bank to pay the principal, on account of the intervention of the law, constitutes a "forbearance" on the part of the depositors, or is simply a past due debt.
7. Whether the stockholders should be subrogated to the rights, if any, of the depositors, for denying them-

selves dividends to the extent of twenty times the amount required by law for surplus, thereby enabling the depositors to receive 100 per cent, in the face of a dissipation of $235,000. in alleged expenses.

8. Whether the Savings Bank is liable for $96,000. wasted since this "nuisance" assessment suit was instituted, and whether the Bank is liable for the $50,000. lost as a result of the negligence of the former Comptroller in failing to pay taxes and collect interest; and whether the Bank is liable for the arbitrary refusal of the former Comptroller to convert the assets into cash and disburse the proceeds, according to law, and if the Bank is liable for his arbitrary refusal to disburse the cash even when he had it on hand.

9. Whether Petitioner is entitled to a trial on its merits upon the acts and the facts stated in the substituted counterclaim, showing that the said Savings Bank was arbitrarily or fraudulently suspended and liquidated, and whether the lower courts violated the due process clause of the Fifth Amendment to the Constitution of the United States in refusing Petitioner a trial on its merits and in refusing him a fair and impartial trial, and violated Article 1, Sec. 10, Clause 6 of the said Constitution prohibiting the impairment of the obligation of contracts.

Jurisdictional Questions.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended, which provides that the Supreme Court of the United States may hear and determine any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, and may require by certiorari that the cause be certified for such determination. The jurisdiction of this Court is invoked to hear and determine the questions presented, because,—

(a) Questions 1 & 2 are questions where the United States Court of Appeals of the District of Columbia has held that the said Savings Bank has not committed any *ultra vires* acts, contrary to the law; and

(b) That Petitioner Cooper is estopped from relying upon the same, as he was paid dividends during the period of the commission of the *ultra vires* acts, contrary to applicable decisions of this Court, and also contrary to former applicable decisions of said Court of Appeals.

(c) The said Court of Appeals has agreed that the law of the District of Columbia should control as to the interest rate, but proceeded in direct violation of the law to increase the rate of interest to 6%, following suggested interest rates in New Jersey, Oregon and elsewhere.

(d) The said Court of Appeals has not given proper effect to applicable decisions of this Court regarding interest rates in the District of Columbia, but has doubled the contract rate in direct violation of the law.

(e) The said Court of Appeals has held that the Savings Bank is liable for interest during the period of the Conservatorship, though that was for the arbitrary purpose of promoting the organization of another bank by the Comptroller.

(f) The said Court of Appeals has held, contrary to the applicable decisions of this Court, that the intervention of the law (the Comptroller) constitutes a "forbearance" on the part of the depositors.

(g) The said Court of Appeals has in effect held, contrary to equity and good conscience, that the stockholders cannot be subrogated to the rights of the depositors, if any, regardless of the fact that they denied themselves dividends to the extent of twenty times the amount required by law, to protect the depositors. This is a question of general importance which should be determined by this Court.

(h) The said Court of Appeals has held that the wasting of $150,000. by the former Comptroller is immaterial and irrelevant and that the Bank and its stockholders are liable to the full amount, regardless of the arbitrary and wasteful negligence of the former Comptroller. This is a question of general importance and should be determined by this Court, as well as the liability of the Bank and its stockholders for the arbitrary refusal of the Comptroller to convert the assets into cash and disburse the same.

(i) The said Court of Appeals has held that the acts showing that said Bank was arbitrarily and fraudulently suspended and liquidated are immaterial, irrelevant and *res adjudicata*, though not a single fact was singled out as having ever been passed upon or considered on its merits, contrary to applicable decisions of this Court, and, in effect, that such arbitrary action was not a violation of the due process clause of the Fifth Amendment to the Constitution of the United States; and that increasing the contract interest rate was not a violation of Article 1, Sec. 10, Clause 6 of the said Constitution prohibiting the impairment of the obligations of contracts. All these are questions of general importance and should be determined by this Court.

Assignment of Errors.

The United States Court of Appeals erred:

1. In holding that the said Savings Bank had not committed any *ultra vires* acts, contrary to the law;

2. In holding that Petitioner was estopped to rely upon the *ultra vires* acts of said Bank;

3. In holding in direct violation of the District of Columbia law that the rate of interest to be paid by the Savings Bank in the instant case is 6%, instead of the rate agreed upon by contract;

4. In holding, contrary to applicable decisions of this Court, that the Savings Bank is required to pay 6% interest, instead of the contract rate;

5. In holding that the Savings Bank is liable for interest during the period of the conservatorship, though it was for the arbitrary act of promoting the organization of another bank;

6. In holding, contrary to applicable decisions, that the said Savings Bank is liable for interest during the conservatorship, though this was the intervention of the law;

7. In holding that the stockholders should not be subrogated to the rights of the depositors, if any, though the

stockholders denied themselves twenty times the amount required by law, for the protection of the depositors;

8. In holding that the negligent wasting of assets to the extent of $150,000. is a liability of the Bank and its stockholders; and in holding the Bank and its stockholders liable for the arbitrary refusal of the former Comptroller to convert the assets into cash and disburse the same, and in arbitrarily refusing to disburse the cash even when in hand;

9. In holding that the acts and the facts showing that the said Savings Bank was arbitrarily and fraudulently suspended and liquidated were immaterial, irrelevant and *res adjudicata*, contrary to applicable decisions of this Court; and, also, contrary to the due process clause of the Fifth Amendment; and that increasing the interest rate, in violation of the contracts, was not an impairment of the obligations of a contract, as prohibited by Article 1, Sec. 10, Clause 6 of the Constitution of the United States.

Prayer.

WHEREFORE, Petitioner Wade H. Cooper prays the allowance of a writ of certiorari to the United States Court of Appeals of the District of Columbia in this cause, there entitled Wade H. Cooper, Appellant v. R. C. Parsons, Receiver, Appellee, No. 8872; that said cause may be reviewed and determined in this Court; and that the judgment of the said Court of Appeals may be reversed and set aside; and for such other and further relief in the premises as this Court may deem meet and proper.

WADE H. COOPER,
Petitioner.

District of Columbia, ss.:

WADE H. COOPER, being first duly sworn on oath, deposes and says that he is the Petitioner named in the foregoing Petition; that he has read the said Petition and knows the contents thereof; and the same is true to the best of his knowledge, information and belief.

WADE H. COOPER.

Sworn to and subscribed before me
this....day of June, 1945.

.....,
Notary Public.

BRIEF AND ARGUMENT.

Ultra Vires Acts.

We have not attempted to go into all the details and ramifications from the beginning of this litigation in 1937, but only a concise statement emphasizing the points at issue, the first of which is the question of *ultra vires* acts of the Saving Bank following the passage of a law by the Legislature of West Virginia prohibiting any West Virginia bank from engaging in business at any place other than its principal office in the State of West Virginia, which reads as follows:

> "No banking institution chartered and authorized to engage in business under the laws of this State, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its principal office in the State of West Virginia; or engage in any business other than authorized in this article." Sec. 3131, 1932 W. Va. Code, Act of Feb. 28, 1929.

Mr. Justice Letts in his opinion, adopted by the Court of Appeals, stated that this statute did not apply to the Savings Bank in the instant case,

> "legally incorporated in West Virginia for the express purpose of conducting its banking business *solely* in the District of Columbia. The United States Savings Bank was not engaged in business under the laws of West Virginia." (R. p. 41.)

The Charter of the Savings Bank does not restrict it to engaging in business "solely" in the District of Columbia, but only identifies its principal office at that place (R. p. 1) and specifically says "chartered and authorized to engage in business *under the laws* of this State," which seems to be plain enough. The bank was subject to the supervision and examination of the Comptroller of the Currency, but under the laws of its Creator, the State of West Virginia. See the leading case of Relf vs. Runkle, 103 U. S. 529, holding that the law of the State to which the Corporation owes

its existence is the law of its existence. Hamilton vs. Bergling 66 App. D. C. 85 F. (2nd) 249. Bergling vs. Wardell (1940) 73 App. D. C. 61, 115 F. (2nd) 948. The Court of Appeals in this instance reversed its position as well as the position of this Court, but refused to assign any reason for its action. Certainly the Comptroller could not issue a charter to a State Bank, as the implication seems to be here. The Court of Appeals held that the act of Feb. 24, 1937, repealing or modifying the prohibitory act of 1929 shows that the act of 1929 *supra* did not apply to the Savings Bank in the instant case. The repealing or modifying act reads as follows:

> "* * * The officers and directors of such non-resident banking institutions may conduct the banking business at such place or places outside of the State of West Virginia as they may be permitted under the laws of the jurisdiction in which such place or places are situated. The restrictions in the banking laws of this State contained as to establishment and maintenance of branch banks shall not be applicable to said non-resident banks, but no non-resident bank shall operate or maintain any branch in this State." Sec. 3224, 1937 W. Va. Code, Act of Feb. 4, 1937.

This later repealing act did not refer to the Bank in the instant case, as the bank was suspended Feb. 10, 1934, or three years prior to the passage of the latter act in 1937. Here it is pertinent to inquire for the reason of modifying the act of 1929, unless it did apply to non-resident going banks. Were the legislators repealing or modifying something not in existence?

The Respondent insists that the title of the act of 1929 shows that the act did not apply to non-resident banks. The title was likely supplied by some engrossing or enrolling clerk. There is nothing in the face of the Statute designating the name of the bill. The title embraces several subjects, as follows:

> "Branch Banks Forbidden; Bank Not to Sign Indemnity Contract or Pledge Its Assets to Indemnify

> a Surety; Exception as to Guarantee of Federal Deposits or State and Divisions Thereof."

Could a clerk render a bill void by failure to embrace every subject in the title? According to authorities he could not.

> "The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtfull or ambiguous. The ambiguity must be in the context and not in the title to render the latter of any avail." (Cornell vs. Coyne (1904) 192 U. S. 418, 430 and cases cited.)

ESTOPPEL. The Court of Appeals held that Petitioner Cooper was estopped to rely upon the *ultra vires* acts of the Savings Bank, contrary to its previous holding in Dunn vs. O'Connor, *et al.* (1937) 67 App. D. C. 83, that:

> "* * * there can be no doubt that the debts * * * created *ultra vires* the corporation, the stockholders of the Continental have an interest entitling them to maintain suit."

The Court of Appeals has also held in Thompson vs. Park Savings Bank, 64 App. D. C. 308, 77 F. (2nd) 955 (1935) that following the expiration of the charter of the bank that

> "Therefore they (the depositors) are estopped to claim the legality of the bank's actions and cannot hold the directors or stockholders liable individually or as partners"

In both these cases the stockholders received dividends right along, as in the instant case, a 100 per cent dividend, as the record shows having been paid by the Park Savings Bank on one occasion. Why did the Court of Appeals reverse itself in the instant case? No reason was assigned. Petitioner was only receiving dividends of 6, 7 or 8 per cent on the Capital stock, and the surplus, which he and the other stockholders had created by their self-denial. Of course, it has a melodious sound to speak of 30 or 40 per cent on the capital, but it was the result of a created surplus.

Equity, of course, will not permit one to rely upon his own wrongful act. But there is no suggestion of wrong in the instant case.

> "The object of a prohibitory law (as here) cannot be defeated by estoppel nor the legally impossible accomplished." C. J. 1228 Annotations.
>
> "A contract made by a Corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the doctrine of estoppel." Union Pac. R. R. Co. vs. Chicago R. I. & P. R. R. Co. 163 U. S. 564.

A leading case is the Central Transportation Company vs. Pullman's Palace Car Co. 139 U. S. 24, 35 L. Ed. 55 where the Supreme Court stated:

> "But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."
>
> "* * * that if the contract is prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter." First National Bank vs. Converse 175 U. S. Page 40.

It will therefore be seen that the Court of Appeals has not only repudiated its own decisions, in the instant case, but has also refused to follow applicable decisions of this Court.

DIVIDENDS. Respondent insists that Petitioner should be denied any right to the surplus left, after the payment of a 100 per cent, as he received large dividends for a time, but there is no credit given for the long denial of dividends in order to create a surplus equivalent to twenty times the amount required by the law of West Virginia, which was only 20 per cent against a Capital of $100,000.00.

> "The Directors of any bank may annually, semi-annually or quarterly declare dividends, but such bank shall, before the declaration of any dividend, carry one tenth part of the net profit accrued to its surplus fund until the same shall amount to twenty percentum of its capital stock." Barnes Code, W. Va. 1923 Acts 1913, Ch. 21.

Unless this surplus had been created the depositors would never have received a 100 per cent (R. p. 4) in view of the dissipation of $235,000. (R. p. 4) in this Receivership. We have already shown that the receipt of dividends does not estop Petitioner from maintaining this action. To penalize Petitioner for receipt of dividends is tantamount to penalizing him for operating a sound and solvent bank. In the old case of Brant vs. Virginia Coal and Iron Co., 93 U. S. 326, 335, 23 L. Ed. 927 this Court said:

> "It is difficult to see where the doctrine of estoppel comes in here. In the application of the doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped."

No such claim is made in this instance. The cases cited by the lower courts are easily distinguishable from the instant case.

Rate of Interest, if any.

For this discussion we are assuming, contrary to the law and the facts, that the savings bank was insolvent and that it was suspended on Feb. 10, 1934, in good faith. The question of good faith we will discuss later.

On March 1, 1901, the Congress of the United States enacted into law the following two sections (Code of 1940) regulating the interest rate to be paid by all persons, firms and corporations in the District of Columbia:

> "The rate of interest in the District upon the loan or forbearance of any money, goods or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year and at that rate for a greater or less sum or for a longer or shorter time; * * *" 28-2701 D. C. Code of 1940, Title 17, 1, 1929 Code (Act of March 3, 1901, 31 Stat. 1377, Ch. 854).
>
> "In an action in the District Court of the United States for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or

> usage, the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the contract, if any, until paid." 28-2707 of D. C. Code 1940 and Title 17 Ch. 1. Sec. 7 of 1929 Code (Act of March 3, 1901, 31 Stat. 1377, Ch. 854, 1184.)

Regardless of what the rate was *prior* to the passage of the above two sections, these two sections clearly control the interest question in the District at present. This is agreed to by Respondent as well as the Court of Appeals (R. P. 44) but both the District Court and the Court of Appeals proceeded to utterly destroy the plain meaning and intent made clear by plain words, of both of the above sections. Petitioner did not insist that the law of West Virginia controlled the interest rate, as stated by Mr. Justice Letts, but that the District law controlled, as embraced in the two sections above mentioned. The law of West Virginia required the contract rate before and after maturity, as stated in Pierpont vs. Pierpont, Admr., 71 West Va., 431 (1912) where the Court said:

> "Interest being the subject of contract, our cases hold that where interest is contracted for at less than the legal rate, that rate will control after maturity and judgment as well as before."

In Morris vs. Bear, 72 West Va., 1, 78 SE 371 the Supreme Court said:

> "It is error to decree interest at 6% when the agreed rate is less."

This was also the law of Virginia, Brooks vs. Roane, 1 Call (Va.) 205; Bent vs. Patten, 1 Rand (Va.) 25.

In the case of Hoffman vs. Unger, a West Virginia case, (1943) (24 S. E. 2nd 911) referred to by Mr. Justice Letts, the Supreme Court *did* declare, the first time in the history of the State, that the depositors were entitled to interest, but there was no change in the rate or in the law, as stated in the two West Virginia cases to which reference has just been made, as this Court will see from a reading of the

concurring opinion. But in the instant case both the lower Courts increased the interest rate on demand or commercial deposits to 6 per cent when the contract admittedly provided that no interest would be paid; and on savings or time deposits the lower Courts doubled the contract rate of 3 per cent, increasing it to 6 per cent, utterly disregarding both contracts and the plain meaning of the District law as embraced in the two sections of the D. C. Code of 1940, a careful examination of which shows that the District law is practically the same as the West Virginia law, as the contract rate prevails *before* and *after* maturity in the District and in the State of West Virginia. Sec. 28-2701 of the D. C. Code provides for interest at the rate of 6 per cent "in the absence of express contract as to such rate of interest". If the Congress meant that the rate would be 6 per cent regardless of the contract, then why say "in the absence of a contract"? The meaning is clear that the contract rate, whether it be nothing or one or two per cent, is to prevail, before and after maturity, when Sec. 28-2701 is read in connection with Sec. 28-2707, which declares:

> "the judgment (after maturity) shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the *contract,* if any, until paid."

Judgments are obtained after and not before maturity, as the lower Courts well understood, but disregarded entirely the District law and followed decisions of the Courts in New Jersey and Oregon and elsewhere, though this Court has held that the law of the District controls.

In R. R. Co. vs. Harman, 147 U. S. 290, Chief Justice Fuller said:

> "Whatever the law of the District of Columbia is, upon the subject of interest controls, of course".

He further stated:

> "It is conceded that at Common law, judgments, whatever the cause of action, did not bear interest."

This declaration is confirmed by all the English cases. In the case of Colton vs. Bragg, 15 East 226, 227, Vol. 14 of English Ruling Cases, Anno. (1916) P. 543, Lord Ellenborough, Ch. J. said:

> "* * * Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years, and during all this time, no case has occurred where, upon a mere simple contract of lending, without an agreement for the payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has been ever given."

In the instant case there was no contract, express or implied, to pay interest on the demand deposits, but a positive contract that no interest would be paid. (R. p. 27.)

In the English case of Cook vs. Fowler, L. R. 7 H. L. 36, 37, reported in Vol. 14 of English ruling cases Anno. (1916) p. 555, the borrower had agreed to pay 5% per month on 1330 pounds. The borrower died before the month passed. The lender kept quiet for four years and then insisted upon 5% per month for four years. The House of Lords affirmed the action of the lower court in allowing 5% per annum and not per month, Lord Hatherly saying:

> "* * * or they (the Jury) may even allow nothing in case they are of opinion that the delay of payment has been occasioned by the default of the holder, that is, the holder of the instrument".

Lord Selborne said:

> "I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your Lordships."

Sections 28-2701 and 28-2707 were likely passed to prevent debtors in distress (as here) from being oppressed by creditors in the manner above outlined.

We again challenge opposing Counsel, as we did below, to produce one single case in the entire history of the District where the contract rate was ever increased by the

Courts before or after maturity. And we challenge Counsel to produce one single case where interest was ever allowed when the contract was to the effect that no interest would be received or paid. The Bank in the instant case was simply borrowing and re-lending. If the Savings Bank borrowed $500,000. from New York at 3% and was in default six months, would this Court increase the rate of interest to 6% in case of suit? Certainly not. There is no such case.

Setion 28-2701 *supra* is practically a reproduction of the act of 1870 as discussed by Chief Justice Fuller in R. R. Co. vs. Harman *supra,* where he said:

> "* * * but the Act does not say they shall bear interest in the future, if they did not in the past" * * * "Judgments and decrees as well as the loan or forbearance money, goods or things in action are referred to, but the Act does not say they shall bear interest in the future if they did not in the past. * * *"
>
> "There is nothing to indicate a legislative intention to declare that *all judgments* and decrees should thereafterwards bear interest by virtue of the Statute, or to make any change in that respect. * * * Judgments bore interest in actions *founded on contract* as provided by the Act of 1812". (Italics supplied.)

In Pierce vs. U. S. 255 U. S. 704 (1921) Mr. Justice Brandeis said:

> "At Common Law judgments do not bear interest; interest rests solely upon statutory provisions," citing cases.

This Court has already defined or interpreted Section 28-2701 *supra* in the case of R. R. Co. vs. Harman *supra* for Section 28-2701 is simply a continuation of the Act of 1870 referred to by Chief Justice Fuller. For the convenience of the Court we here reproduce the Statute of 1870, being sec. 713 of the Act of 1870.

> "The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate

for a greater or less sum, or for a longer or shorter time, except as provided in this chapter." Sec. 28-2701 did not change the law requiring a contract for interest, though the rate may be omitted.

A comparison will show that there is no difference whatever in the two sections. Richards vs. Bippus, 18 App. D. C. 293 is relied upon by Respondent as being *persuasive* "although decided just prior to the enactment of the above noted Code provision", (28-2701). But this was simply the reduction of the interest rate from 10 per cent to 6 per cent, the legal rate. No case has been found where the Court increased the contract rate. Any statement to the contrary in Richards vs. Bippus *supra* was not even dictum, but merely mistaken observation. In Stewart vs. Barnes 154 U. S. 456, this Court declared in emphatic language that the failure to demand interest upon payment of principal was equivalent to the waiver of interest. Of course pending the payment of principal a demand would be useless and worthless, but upon payment of principal, interest should be demanded or waived as stated in Stewart vs. Barnes, *supra,* and, also as stated in Kimball vs. Williams (1910) 36 App. D. C. 43, which holds that "acceptance of principal presumes waiver of interest."

FORBEARANCE. Mr. Justice Letts, in his opinion (R. p. 44) says that the suspension of the bank constituted an "actual and unqualified" forbearance of the claims of all depositors. The authorities are all to the contrary. There is a vast difference between a default and a forbearance. Forbearance is the result of an agreement, as stated in Words and Phrases, Vol. 17, pp. 231, 232, Perm. Ed. 1940.

"To establish legal contract to forbear, there must be allegation and proof of request and promise to forbear * * * forbearance being a delay in enforcing rights." Shaw vs. Philbrick, 151 A. 423, 425, 129 Me. 259, 74 A. L. R. 290.

"Forbearance in the legal sense of the word, is an engagement which ties up the hands of the creditor. It

is an act of the creditor (not the law) depriving himself by something obligatory of the power to sue." Reynolds vs. Ward, N. Y. 5 Wend. 501, 504.

"The forbearance of giving time for the payment of a debt is in substance a loan." Diercks vs. Kennedy, 16 N. J. Eq. (1 C. E. Green) 210, 211, Citing numerous cases.

It is doubtful if any bank in the country ever increases the interest rate on paper in default or past due. Let opposing Counsel name one. This court in 1879 in the case of Holden vs. Trust Co. 100 U. S. 72, 25 L. Ed. 567 made the observation that the custom in the District was to allow the legal rate after maturity, but not one single case can be found to sustain that mistaken observation. Anyway this was in 1879 or long prior to the contrary opinion of this Court in 1893, as delivered by Chief Justice Fuller in R. R. Co. vs. Harman 147 U. S. 290, *supra*, which should control here.

CONSERVATORSHIP. The former Comptroller arbitrarily held the Bank in the hands of a Conservator for eleven months using it to promote the organization of another bank (R. p. 5) instead of liquidating it, if he honestly believed it insolvent. The Bank should be purged of all interest for this period.

"The running of interest is suspended where payment is prevented by operation of law," Vol. 7, p. 226, Enc. U. S. Sup. Ct. Reports 1910.

"It would be manifestly unjust to exact interest as compensation, or damages, when the payment of the debt was interdicted", Brown vs. Hiatts, 15 Wall 177, 185. 21 L. Ed. 128.

"It does not appear reasonable that a decree • • •, ought to direct interest to be paid on the money which that injunction restrained the defendant from using", Osborne vs. U. S., 9 Wheat. 738, 837, 6 L. Ed, 204, (no interest was allowed).

"• • • Interest is not allowed on the claims against the funds. The delay in distribuition is the act of the law; it is a necessary incident to the settlement of the estate," Thomas vs. Western Car Co., 149 U. S. 95, 116, 37 L. Ed. 663.

Why should an exception be made in the case of any bank?

The highest rate on savings by banks in the District is one per cent (R. p. 55). But the lower Court without a line of evidence increased the rate in the instant case to six per cent or six times the prevailing rate, which would seem to be so unfair as to shock the conscience of any fair and impartial mind, especially after a dissipation of $235,000., and after the stockholders denied themselves twenty times the amount required by law, in order to protect the depositors.

SUBROGATION. Here it would seem that the doctrine of subrogation could very properly intervene in order that perfect justice could be done.

> "It was invented and applied in order to do justice and prevent an injustice being done in a particular case and under a particular state of facts where the law is powerless in the premises", Probst vs. Wigginton, 281 U. S. 834, 213 Ky. 610; Arlington State Bank vs. Paulson, 78 N. W. 303, 57 Nebraska 707, 747 (Rev. on other grounds, 80 N. W. 263, 59 Neb. 94).
>
> "It is applied to subserve the ends of justice, to do equity in the particular case under consideration, and to prevent fraud" (C. J. 60, p. 698, citing authorities).
>
> "Its basis is the doing of complete, essential and perfect justice between all parties without regard to form," (C. J. 60, p. 699).

As the stockholders denied themselves dividends for years in creating a surplus for the protection of the depositors, twenty times the amount required by law, as already shown, why would it not be fair and equitable to subrogate them to the rights, if any, of the depositors or to such extent as seems fair and just, instead of penalizing them six times the amount of loss, if any, plus a "nuisance" assessment suit or by waste?

EQUITY. In 1937 the Legislature of West Virginia (House Bill No. 400, Chap. 10) passed an Act amending

Article 8, Ch. 31 of the Code of West Virginia, by adding thereto Sec. 32(b) providing:

> "* * * that in the administration by receivers of the assets of insolvent banking institutions having deposits of moneys belonging to the State of West Virginia, no greater rate of interest shall be paid on such deposits than that paid for the same period or periods on the same class or classes of deposits by solvent banking institutions, operating in the usual course of business."

This Act applies to both State and National Banks, and was passed to prevent an injustice being done. This Court, the highest Court in the land, should not permit such an *unfair practice* as requiring a bank in liquidation to pay six times the prevailing rate or double the contract rate either as interest or damages without evidence as such a pronouncement is contrary to equity and good conscience, contrary to natural law and the moral law, as well as the Fifth Amendment and, in effect, is an invitation to the Comptroller to abuse his power and render a bank insolvent, as illustrated in the instant case, by wasting and dissipating its assets and by the imposition of an impossible interest rate. Such a pronouncement would tend to encourage depositors to favor closing all solvent banks, as they would receive so much more than from a going bank. In Jackson County vs. U. S., 308 U. S. 352, this Court said that interest

> "is given in response to considerations of fairness, and is denied when its exaction would be inequitable."

In American Tobacco Co. vs. South Carolina National Bank, 15 F. Supp. 215 (1937) the Court allowed interest at 2 per cent. In American Ins. Co. vs. Lucas, 38 F Supp. 896, 925, the Court (Three Judges) held:

> "Interest will be allowed or denied 'in response to consideration of fairness.' "

In U. S. vs. Rodiek, 120 F. (2nd) 760, 761, the Court said:

> "* * * interest is recoverable only in response to consideration of fairness".

In Bank vs. Morgantheau, 66 App. D. C. 234, the Court allowed interest "*since the date when the receiver took*

possession of it'' in 1934, but Respondent is insisting upon interest during the Conservatorship of eleven months, though the Comptroller's office has held that no interest is due during the conservatorship, basing its opinion on Richmond vs. Church, 76 F. (2nd) 344. The cases here cited are not the same as the instant case, but they are cases of equitable jurisdiction and, therefore, the same controlling principles of equity apply

> ''Interest upon the principal sum from the date of default, at a fair rate, is the appropriate measure of damages for delay in payment of a sum due''. Royal Indemnity Co. vs. U. S., 85 L. Ed. 888.

WASTE. The report of the Receiver of March 31, 1937 (Ex. ''C'' R. p. 48) shows costs of liquidation $138,317.80
Present liquidation costs (R. p. 22) $235,000.00
An increase since the ''nuisance'' assessment suit in 1937 of ....$ 96,282.20
Add cash on hand $175,000.00
Total of $291,000.00
on hand in 1937 when the ''nuisance'' suit was brought or .....$ 66,957.64
more than the alleged claim for interest of.....$204,724.56

Petitioner will show that the liquidation was practically completed in 1937 and that this $96,282.20 was simply wasted to justify this ''nuisance'' suit. Further, Petitioner has charged the waste of approximately $50,000.00 as the result of gross negligence in failing to pay taxes and collect interest. Petitioner is not bound to disclose his evidence, but has furnished a list of a dozen or more improved pieces of real estate where this negligence occurred, in some instances totaling around $4,500.00, as in the case of 1937—3d St., N. W. Who should suffer for such waste as this?

That the former Comptroller could easily have paid all *proven claims* on or before Sept. 30, 1934, is shown by all

the reports of his Receiver. See affidavit (R. pp. 46, 47) and reports (R. pp. 48, 49). On April 23, 1934, the sum of $1,080,000.00 was borrowed from the R. F. C. (R. pp. 6 & 49) but was not distributed until June 28, 1934; that $775,000.00 was borrowed from the R. F. C. on March 31, 1935 (R. pp. 6 & 49) but was not distributed until Oct. 22, 1935, or a period of six months and twenty days, leaving a balance on hand of $281,846.96, after restoring $771,193.12 to the R. F. C., or easily enough to have paid *all* proven claims. Why borrow the money and hold it or restore it, without using it? Who should suffer for all this waste? We are unable to find any similar reported bank cases. As the cash and the assets were primarily for the depositors, it would seem their loss, as the Court of Appeals has already held that the Comptroller was immune and above the law so far as the stockholders are concerned. Cooper vs. O'Connor, *et al.* 69 App. D. C. 100 and Cooper vs. O'Connor, *et al.* 69 App. D. C. 108, contrary to our Constitution which limits immunity only to Senators and Representatives. If the stockholders and the bank can be made to suffer for all this neglect and waste, then the bank and the stockholders could be made to suffer for any amount dissipated and wasted on account of negligence or failure to convert the assets and make distribution, regardless of the amount involved.

ARBITRARY ACTS. When a bank is shown to be four times solvent, as here, it would seem to be a *prima facie* case of bad faith, without some explanation for its suspension. None is attempted in the instant case, not even a denial, but Respondent rests upon a motion to dismiss upon the ground that the facts and the acts set up showing that the bank was arbitrarily or fraudulently suspended are immaterial, irrelevant and *res adjudicata.* If this motion is treated as a demurrer, then Petitioner would be entitled to a judgment, as the motion or demurrer is an admission of the facts, except as to *res adjudicata.* But

as not a single fact was set up showing a trial upon its merits, the plea of *res adjudicata* must also fail. The arbitrary act which entitles Petitioner to relief, is the act of suspending the bank. Science has not yet developed a method of divulging or disclosing the thoughts of a man, except the Japanese, where the police arrest a citizen for thinking the wrong thing, and therefore, we must rely upon his words and his acts, in order to reach a fair conclusion of his intentions. If your Honors will take the time to read the substituted counter claim (R. pp. 3, 11) we do not think you will have any difficulty in reaching the conclusion that the intention of the former Comptroller was to wreck and destroy the Savings Bank in the instant case, knowing that it was perfectly solvent. (1) Why did he require $150,000.00 cash (new money) as a condition precedent to the opening of the bank when at the same time he was approving the sale of preferred stock and debentures to the extent of $574,000.00 by other banks? (2) Why did he permit other banks to defer or delay payments of as high as 65%, but refuse to permit this bank to open upon deferring only 35%? (3) Why did he permit other banks to open upon payment of 2% interest, but required this bank to pay 6%? (4) Why did he insist upon suit against the stockholders over the protest of his Receiver, Carter B. Keene, to the extent of a loss of $96,000.00? (5) Why did he refuse to follow the suggestion of his superior, the Secretary of the Treasury, to bring in a plan to open the bank? The substance of his answer was his animus toward Petitioner because of previous litigation. (6) Why did he refuse to distribute $775,000.00 cash on hand March 31, 1935, for over six months? Why did he refuse to pay all proven claims ($1,581,340.81) in full on March 31, 1935, instead of restoring $771,000.00 to the R. F. C., and in refusing to disburse $281,846.96 cash left over after restoring $771,000.00 to the R. F. C. (R. p. 48 Ex. "B"). He could have done this and still have left to restore to the R. F. C.

$498,579.42. (7) Why did he refuse to borrow on the assets or sell them at par and pay all proven claims promptly in July 1934, which he could have done? (Affidavit R. pp. 51, 52). We are now referring to the arbitrary refusal to liquidate the assets and pay all proven claims, (not solvency) which would have eliminated all or nearly all of the interest charge. The lower courts sustained the motion of Respondent to dismiss all these charges as immaterial, irrelevant and *res adjudicata*, though any one of them, unexplained, would convict the former Comptroller of being arbitrary.

RES ADJUDICATA. There has never been a trial of this case on its merits. None of the charges have ever been passed upon their merits at any time, and no such claim has even been made, though the lower Courts, contrary to all the authorities, sustained the motion to dismiss as *res adjudicata*.

> "* * * the plea is still open to the objection that it leaves to conjecture what was involved and decided in the former suit and is, therefore, insufficient to show estoppel by record." (Whitaker vs. Davis, 91 F. 721, citing Russell v. Place, (94 U. S. 606, 610.)
>
> "* * * When new facts intervene (as here) before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issue is no longer the same, and consequently the former judgment cannot be applied in bar." (24 A. & E. Enc., p. 829.)
>
> "The estoppel of a judgment extends only to the facts as they were at the trial when judgment was rendered." *(Id.)*
>
> "Nor can such effect (*res adjudicata*) be given to a judgment where the court undertakes to decide a question (as here) not raised by the pleadings or submitted by the parties." (C. J., Vol. 34, p. 768.)
>
> "The decree, not being on the merits, could not be a bar to such subsequent suit in a State or United States Court." (Swift v. McPherson, 232 U. S. 504.)
>
> "Specific facts must be alleged to show the consideration and determination upon the merits." (23 Cyc. of Law & Prac., citing numerous authorities.)

"* * * There can be and ought to be no repose of society where for such wrongs the Courts are incapable of giving redress * * *," Graver v. Faurot, 76 F. 263.

"These and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and amend the former judgment or decree, and open the case for a new trial and a fair hearing." U. S. v. Throckmorton, 98 U. S. 95, citing authorities.

Petitioner set up the facts showing arbitrary action and in his prayer, asked the Court, upon a trial by jury, to declare that the Bank was arbitrarily and fraudulently suspended. The Bank had capital and surplus of about $350,000 on Sept. 30, 1932 (R. p. 38).

Mr. Justice Bailey of the District Court in the case of McKinley High School Bank, *et al.*, vs. Preston Delano, *et al.*, Civil Action No. 17348, an action brought by a number of depositors to prevent the Comptroller from paying some depositors 3% and others 12% as the result of an alleged agreement, upon a motion to dismiss a cross complaint by this Petitioner, sustained the motion to dismiss upon the ground that the question had become "moot" (The Court of Appeals had set aside the alleged agreement.) in Cooper vs. Goldsmith, *et al.*, decided May 20, 1943, and, also held that "the matters of fraud charged were not extrinsic to the suit", and that the remaining relief sought was *res adjudicata* in Cooper vs. Woodin, *et al.*, 63 App. D. C. 311, and Bank vs. Morgenthau, 66 App. D. C. 234, though not a single fact charged was ever in issue in either of the cases (R. p. 9) to which reference was made by Mr. Justice Bailey, and no such claim ever made. The question in the McKinley High School case *had* become moot in the case of Cooper vs. Goldsmith, *et al.*, 77 App. D. C. 392 (1943) 138 Fed. (2nd) 1931 but to hold that the facts charged showing arbitrary action were *res adjudicata*, was simply contrary to the facts, as the records show, and contrary to the law,

as already shown. Neither of the cases were ever tried on the merits, and *none* of the facts set up in the instant case were in issue in the cases referred to by Mr. Justice Bailey. This order is not binding on anyone in any case, except that particular case, as not a single fact was passed upon and none alleged to have been, as the authorities require, though respondent relied upon that order to sustain his *res adjudicata* motion. This action of Mr. Justice Bailey was simply Judicial tyranny or Judicial sabotage, just as his action was ten years ago, when he permitted the destruction of the bank in the face of the record showing that it was sound and solvent, though some of the assets were slow, like real estate notes.

Mr. Justice Bailey referred to the Cross Complaint in the McKinley High School Bank case, *supra*, as a bill of review, when it should be treated as an original bill.

> "The jurisdiction of Courts of Equity to reopen and set aside former decrees on the ground of accident, mistake and surprise is well recognized and frequently invoked * * *." (Dewey v. Stratton, 114 F. 185 (5th Circuit).)
>
> "A species of fraud frequently regarded as sufficient for equitable relief is misrepresentation." (39 Am. Jur. 670.)

Petitioner charges misrepresentation in Bank v. Morgenthau, *Supra*, No. 6605 (R. pp. 8, 9).

> "An *original bill* in the nature of a bill of review to set aside for fraud a decree entered on a mandate from the circuit Court of Appeals, may be filed *without* first obtaining leave of such Court," (Richie v. Burke, 109 F. 16, citing Story's Equity Pleading and Daniel's Chancery Pleading and Practice.)
>
> "* * * but such relief (Motion or bill of review) is not always adequate, and an *original bill* is a proper mode of seeking redress against a decree obtained by fraud or collusion or through mistake, accident or surprise." (Cyc. of Proc., Vol. 4, p. 342.)

See also King vs. West Va., 216 U. S. 92; Remington vs. C. P. R. R. Co., 198 U. S. 95, 99, 111; Gr. Western Tel. Co.

vs. Burnham, 162 U. S. 339, 343. The books are full of cases sustaining the right of petitioner to maintain a new suit "to set aside and amend the former judgment or decree, and to open the case for a new trial or a fair hearing", as stated in U. S. vs. Throckmorten, 98 U. S. 95.

We have here anticipated the brief of respondent, hoping to avoid the filing of a reply brief.

DUE PROCESS. The hearing of the motions in this cause was really a "farce" from every standpoint. The respondent relied upon the order of Mr. Justice Bailey as to *res adjudicata* in the case of McKinley High School Bank, *et al.* vs. Delano, *et al.*, Civil Action No. 17,348 and also upon his volunteer opinion as to the interest rate, in that case, to which we have already referred. Mr. Justice Letts had already refused to permit certain depositors to intervene by petition for a settlement (R. p. 2). He had already ordered the bank building sold, over the protest of this Petitioner, without waiting for a trial of this case (R. p. 51), regardless of the income from the building. He did not mention the opinion of Mr. Justice Bailey in his decision, though he followed it. It would have been stupid to expect him to hold otherwise. He objected to the length of the counter-claim, and, in deference to him, petitioner got permission to withdraw the original and file a substitute counter-claim (R. p. 3). There is no question but that Mr. Justice Letts determined to do exactly what he did do, long prior to the hearing, for certainly he would not have sold the Bank Building, unless he had so determined, for otherwise the sale would not have been necessary. He refused a jury trial as demanded. There was no evidence at all of damages except 1% (R. p. 55). The hearing was simply a "farce" and in violation of the due process clause of the Fifth Amendment.

CONTRACTUAL OBLIGATIONS. Petitioner has already shown what the law of the District was regarding the rate of interest to be paid (see sections 28-2701 and

28-2707 of the D. C. Code of 1940, *supra)*. The agreements entered into with the depositors, conformed to, or complied with, the provisions of these two sections in every way as already explained, and being a valid contract, any modification or alteration of same, whether by Judicial Legislation or otherwise, would be in violation of Article 1, Sec. 10, clause 6 of the Constitution of the United States, prohibiting the impairment of the obligation of contracts. This is too plain for extended discussion. The lower Courts were in error in seeking to alter or modify the contracts to conform to the laws of Oregon or New Jersey, as the District law admittedly controls (R. p. 18).

EQUITY UNFETTERED. Judge McColloch, it is claimed by Respondent, in the case of Elliott vs. Bank (Oregon), 32 F. Supp. 839 said:

> "Equity unfettered, might arrive at a different result, in view of the greatly reduced interest rates of current times, but, as said, the question is controlled by statute and judicial interpretation of long standing."

Equity *is* "unfettered" here. We have already shown that no interest is due, except by contract. (See R. R. Co. vs. Harman, 147 U. S. 290, *supra)* and that the contract with the demand depositors provided that no interest should be paid, but with the savings depositors 3% was to be paid. We are not acquainted with the laws of Oregon, but think that we have already shown that Equity is "unfettered" and has concurrent jurisdiction to intervene and prevent an injustice to any one.

RATABLE DIVIDEND. A "ratable dividend" in the National Bank Act plainly refers to principal and not to interest, as urged by Respondent, as the paradoxical situation of an *insolvent bank* ever being able to pay interest was not even dreamed about by the Congress of 1878 when the National Bank Act was passed. This preposterous and paradoxical situation was created as the result of the fertile imagination of a member of this Court long ago, and

in persuading this Court to hold that the word of the Comptroller was the law, right or wrong, unless infected with bad faith, this latter holding being necessary to maintain the paradoxical and illogical holding that an insolvent bank could pay interest. This is a good time to correct that preposterous performance. (But here the District law controls, passed in 1901, long after the National Bank Act of 1878.) A simple reading of the Statute will show that a "ratable dividend" is to be made "on all such claims as may have been proved to his satisfaction" (12 U. S. C. A. Sec. 194). There was no thought of interest at the time. In addition to the National Bank Act (12 U. S. C. A. Sec. 194) showing that there was no thought of such a preposterous proposition that an insolvent bank could pay interest, Sec. 371 b. of the Federal Reserve Law as printed in the 1934 Ed. of the U. S. Code (large red volume) specifically declares that the Federal Reserve Board shall limit the rate of interest on

> "time and savings deposits having different maturities or subject to different conditions * * * by reason of different locations."

all of which shows that there cannot be an unbending and unyielding rule or law, on account of different conditions and different interest rates in different locations in a large and growing Country. This Court would render a great public service by laying down some fair and equitable rule regarding the payment of interest by banks in receivership (if interest *must* be paid) similar to the rules of the Federal Reserve Board. For the taking of the property of one citizen and transferring it to another citizen, as interest in the nature of damages, without a line or a word of proof, as in the instant case, to support or sustain such a judgment, especially six times the prevailing rate or six times the amount of damages that could possibly be proven (R. p. 55) is clearly discriminatory and confiscatory, and contrary to the due process clause of the Fifth Amendment, as well as to Magna Charta and every principle of

natural justice. The depositors in this instance, if called upon, would affirm the above statement.

Petitioner offered to pay 4% to all depositors, as a settlement, or double the prevailing local rate (R. p. 55) but the Comptroller's office insisted that 3% was sufficient, until the canvass was completed, then the Comptroller's office insisted upon 12% to all those depositors who could not be found or had not agreed, which certain depositors and this Petitioner opposed. (Cooper vs. Goldsmith, *et al.*, 77 App. D. C. p. 392 (1943); 138 Fed. (2nd) 931.) The Court of Appeals sustained our position and set the alleged agreements aside. The Court of Appeals has held, contrary to our Constitution, that the Comptroller and all other Officials are immune and above the law, whereas Sec. 20 of the Criminal Code specifically declares that if any person "under color of law" deprives any citizen of his constitutional rights, such person shall be punished, etc. There is also a section in the Criminal Code (Sec. 19) providing severe punishment (ten years) for persons conspiring against a citizen of the United States. The Baker County, Georgia, offenders recently before this Court for the killing of the young colored man may be guilty under both sections. But the point is, that our Court of Appeals has gone squarely against the spirit of both of the above statutes in granting immunity to all our U. S. Officials as stated in Cooper vs. O'Connor, *et al.*, 69 App. D. C. 100 and Cooper vs. O'Connor, *et al.*, 69 App. D. C. 108. According to our Court of Appeals persons (officials) conspiring to destroy your property are above the law and cannot be held liable for damages, though Sec. 19 subjects the same conspirators to ten years imprisonment and a $5,000.00 fine. This is not a very pleasant condition to contemplate. Such pronouncements are calculated to sink our laws into a vortex of insufferable nonsense, as is well illustrated in the instant case wherein the lower Court held that your Petitioner was *estopped* to rely upon *ultra vires* acts, though the same Court held ex-

actly to the contrary in the case of Thompson vs. Park Savings Bank, 68 App. D. C. 276 and Dunn vs. O'Connor, *et al.* (1937) 67 App. D. C. 83 to which we have already referred. If the citizen cannot hold the offending official liable for damages, and cannot prevent the waste and destruction of his property by some legal or equitable process, then the rights of the citizen are at an end in this Country, and we are operating under a government of men and not of law. And if this Court or the lower Courts can, by judicial fiat, without a line of evidence to justify it, (as here) arbitrarily increase the amount of compensatory damages (1 per cent) to six times the actual amount proven, or from $1,000.00 to $6,000.00, then the Courts could arbitrarily increase the amount to six times six, both increases, however, being confiscatory, and in violation of the due process clause of the Fifth Amendment. The measure of damages, if any, is either (a) according to the contracts for interest or (b) according to the amount proven. However, we think that owing to the importance of the question this Court should intervene and lay down a fair and just rule, as the Federal Reserve Board is required to do. In the instant case some of the large accounts ($25,000.00 to $50,000.00) would realize two, three, four, five and some as high as $6,000.00, or six times the actual amount of damages sustained under the present prevailing rate of one per cent interest. Would this Court entertain for a moment the idea of arbitrarily increasing six times the amount of damages proven in any other breach of contract case? Certainly not. Then why permit such a confiscation in any bank case, whether the bank is solvent or insolvent? We feel sure that your Honors will all approve without division, of the statement of Mr. Justice Jackson in the Jewel Ridge Coal case that "Power should answer to reason none the less because its fiat is beyond appeal."

Are Banks to be penalized because they were solvent and able to pay dividends? This seems to be the view of op-

posing Counsel, though we must aquit both Comptroller Delano and Receiver Parsons of any such views for they only desire a fair and equitable rate paid, the penalizing idea having its origin elsewhere.

INSOLVENCY. Banks are regarded as insolvent only when unable to meet their *regular* or *usual* demands, but not so in case of a "run" or as the result of acts beyond their control or the acts of God, such as a world wide depression (as here) or similar conditions. In case of a "run" the only sensible thing to do is to put on restrictions, as we did, until the excitement is over, which requires only a few days. The Congress confirmed our action in March, 1933 in enacting a law authorizing the Comptroller to put on restrictions when necessary. (Act of March, 1933). Banks rarely, if ever, close, if withdrawals are restricted. Petitioner had a little stock in a small bank in Maryland that restricted withdrawals, in March, 1933 to 2%, but the excitement soon passed, and that bank is today doing a fine business and easily earning 50 per cent on its capital stock of $25,000.00.

> "A bank is solvent when it has enough assets to pay within a reasonable time, all of its liabilities through its own agencies, although it does not have cash sufficient for its daily needs," (9 C. J. S. 493, Sec. 485, Citing numerous authorities including State and Federal Courts.

CUMULATIVE EVIDENCE. All banks were, more or less, non-liquid and unable to realize 100 per cent on their assets for some time, before and after March, 1933, but that does not justify arbitrarily penalizing them as such an unfair and unreasonable amount as sought here, when the bank was four times solvent. Counsel for Respondent have endeavored to build their case on prejudice because of solvency, because of ability to pay dividends, because of restrictions to save the bank and because of money wasted by the previous Receiver ($96,000.) since the "nuisance"

assessment suit was brought (blaming petitioner) the Receiver having on hand at that time $66,000. in good assets in excess of the amount needed to pay the $204,000.00 of interest or excess damages claimed (R. p. 48), but they forget that the stockholders denied themselves dividends to the extent of twenty times the amount required by law for surplus. The evidence that the savings bank was arbitrarily destroyed is cumulative. If this Court will take Judicial notice of Misc. 40, Vol. 1 & Vol. 2 of the District Court, it will find that 10 or 12 petitions per day were filed almost daily for some time by Counsel for the Receiver for the purpose of exchanging good 6 per cent real estate notes for 3% Home Owners Loan bonds; that instead of combining them all into one petition, as they should, a separate petition was filed for each and an exorbitant and indefensible fee paid in order to destroy the bank by dissipating its assets, as Counsel have received around $50,000.00 for alleged services for this small institution. (The General Counsel for the Comptroller did practically all the work in previous litigation with Petitioner.) One petition to sell or exchange assets was all that was necessary. The Receiver and his assistant were both competent attorneys for this class of work and certainly could have drawn all necessary orders. Vol. 1 is a thick heavy volume filled with these petitions and orders, which any stenographer could copy. We cannot discuss other acts not of record. Neither Mr. Justice Bailey nor Mr. Justice Letts ever intervened to stop this waste, though they were constantly signing orders. Both these Judges have uniformly been nice and courteous to Petitioner, but this is a matter that should not be covered up in the arbitrary manner indicated. Lord Bacon said that he "appreciated the noble manner of the presentation more than the matter" when the Earl of Essex presented him a country estate near Twickenham. But this is in reverse,

Conclusion.

We regret the length of this brief, but Respondent raised numerous questions, which we thought proper to answer.

We have the concurring opinion of opposing Counsel as to *ultra vires* acts as expressed in Thompson vs. Park Savings Bank in our Court of Appeals, October term 1934, No. 6328, p. 68, wherein they say:

> "* * * that irrespective of Statute, the general rule of law requires an accounting from directors who have continued a business subsequent to the expiration of the Charter life and corporate existence of a corporation, and that the overwhelming weight of Federal and State authorities charge individuals who conduct an entire business *ultra vires* of the corporate powers with individual and personal liability for all obligations thereby created."

These gentlemen now join the lower Court in changing the law to fit the occasion.

The depositors had a right to set up a resulting trust in the assets wherever found, but cannot hold the bank liable for interest or acts subsequent to the prohibitory act passed. As there is no evidence whatever to sustain the action of the lower Courts, not even a finding of fact as to any damages, by the District Court, it would seem that the case should be reversed (a) as to *ultra vires* acts or (b) with instructions to either hear proof as to damages or (c) stand by the contracts entered into as to the rate of interest, if any, to be paid, according to the law, and order a trial on its merits if desired by either party, unless this Court will fix a fair and just rate. This litigation should be ended, but it should be ended according to law or the rules of Equity and justice.

The lower Courts should not be permitted to make a hollow mockery of justice in order to cover up the lawless acts of public officials.

Speaking of the basic rules that govern human society, Pope Pius XII in his remarkable Christmas message in 1943, made this observation:

> "They can be denied, overlooked, despised, transgressed, but they can never be overthrown with legal validity."

We think it was Thomas Jefferson who said that "Power feeds upon Power".

Our Constitutional guaranties should remain inviolate. Socrates had such profound respect for the law that he refused an opportunity to escape just before he drank the hemlock. Resistance to tyranny is obedience to God.

Respectfully submitted,

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University Club.

NOV 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 147.

WADE H. COOPER, *Petitioner,*

vs.

R. C. PARSONS, Receiver of the United States Savings Bank, *Respondent.*

PETITION FOR REHEARING OF PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WADE H. COOPER, *Pro Se,*
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Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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PETITION FOR REHEARING OF PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner, Wade H. Cooper, respectfully requests a rehearing and a reconsideration of his Petition for the Writ of Certiorari to the United States Court of Appeals for the District of Columbia, which was denied by this Court on October 8, 1945.

Statement.

The questions presented in this cause are questions of general importance and great public concern and extend far beyond the mere liquidation of a solvent bank, to every part of the country wherever a National Bank is located, which means almost every city and village in the United States. Not only that, but the questions presented are all questions where the lower Courts refused to follow applicable decisions of this Court, and refused to obey the plain letter of the law as to the rate of interest to be paid by the Bank, and invaded the constitutional rights of Petitioner as a citizen of this country in violation of the due process clause of the Fifth Amendment and in impairing the obligations of contracts. The questions presented for consideration and determination meet squarely and fairly the character of reasons laid down by this Court in its Revised Rules adopted February 13, 1939, as stated under Rule 38, paragraph 5(c).

If there is to be any change or modification of applicable decisions of this Court, these changes should be made by this Court and not by the lower Courts; and if any statute of the United States is to be changed or modified or disregarded for any reason, it should be done by this Court and not by the lower Courts, or we shall have a multiplicity of conflicting decisions and a resulting amount of impossible and unutterable confusion, a vortex of insufferable nonsense.

In the consideration of this Petition, it is important for this Court to keep in mind the following material facts:

1. That the bank was four times solvent because the stockholders, by their self-denial of dividends, created a

surplus for the protection of the depositors, fifteen or twenty times the amount required by law (p. 13, our first brief for the law).

2. That by this self-denial the depositors were paid 100 per cent just as soon as the former Comptroller of the Currency was willing to pay it, after an admitted expenditure of $235,000 (R. p. 22). (The report now shows $288,000 expended, with a surplus of $160,000 left.)

3. That the highest rate of interest on savings paid by banks in the District is one per cent, and no interest on commercial accounts (R. p. 55) and that the contract rate prevails in case of a judgment.

4. That the former Comptroller of the Currency held the bank in the hands of a Conservator for eleven months, seeking to sell its prime assets to another bank of his own promotion at 100 cents on the dollar (R. p. 5) instead of liquidating it, if insolvent, as the law requires.

5. That the former Comptroller arbitrarily refused to promptly convert the assets into cash and distribute the proceeds, as the law requires, for eleven months, while engaged in dissipating the assets and accumulating an interest charge (R. pp. 46, 47).

6. That the former Comptroller arbitrarily refused to make distribution of the cash on hand for months at a time (R. pp. 46, 47).

7. That the bank was arbitrarily and fraudulently liquidated and destroyed (R. pp. 3, 11).

8. That this Court has a perfect right to assume equity jurisdiction, if it wills to do so, and fix a fair rate of interest, in the unusual circumstances in this case (our first brief, pp. 22 and 30).

9. That, according to previous decisions of this Court, the doctrine of *subrogation* should apply (p. 21, our first brief).

10. That the lower Courts had prejudged the law and the facts, and denied Petitioner a fair and impartial hearing in violation of the due process clause of the Fifth Amendment, and in violation of Article 1, Section 10, Clause 6 of the Constitution, prohibiting the impairment of contractual obligations.

Jurisdictional.

While Sec. 240(a) of the Judicial Code, as amended, says this Court *may* hear and determine any case, it does not mean this Court *may*, with utter indifference, brush aside any case where either the law or the Constitution has been violated by the lower Courts. The word *may* is used instead of *shall* in order to give this Court authority to deny a hearing where the case is without merit, or where the law or the Constitution has not been violated. Every member of this Court takes a solemn oath

> "to administer justice without respect to persons, and do equal justice to the poor and to the rich * * * agreeably to the Constitution and the laws of the United States."

Therefore, the members of this Court are bound by solemn oath to administer justice without respect to persons and to support the Constitution and the laws of the United States. We expect to show that not only applicable decisions of this Court have been disregarded, but that the law regarding interest rates, as enacted by Congress, and the Constitution have been, without reason, violated by the lower Courts.

Reasons for Rehearing.

1. *ULTRA VIRES* ACTS. Petitioner has never sought to deprive the depositors of a reasonable rate of interest, as they were not responsible for the destruction of the bank, but he sought to show that the Savings Bank was not liable for its *ultra vires* contracts, according to applicable decisions of this Court, as well as the Court of Appeals, as stated in our first brief on pages 12 and 13, citing Dunn v. O'Connor, *et al.* (1937) 67 App. D. C. 78, (89 F. (2d) 820) where the Court of Appeals said:

> "It (the Trust Co.) received from time to time dividends from the Commercial (Bank) aggregating $105,000 on Commercial)Bank) stock and presumably distributed these to its own stockholders as dividends * * *."

Continuing the Court said (p. 85):

> "* * * there can be no doubt that * * * the debts * * * created *ultra vires* the Corporation, the stockholders of the Continental (Trust Co.) have an interest entitling them to maintain a suit * * *."

This would seem to dispose of the question of *estoppel* of Petitioner because he had received dividends, as claimed by Respondent.

And in Thompson v. Park Savings Bk., 68 App. D. C. 276, (96 F. (2d) 544) the Court of Appeals said the bank continued

> "* * * to declare dividends, to be examined by the Comptroller * * *."

The case of the American Surety Co. v. Moran, 64 App. D. C. 127, relied upon by Respondent, easily distinguishable from the instant case, as in that case the American Surety Co., duly incorporated, without any question of its charter right, had issued its bond for $50,000.

The position of the Court of Appeals in the above first two-mentioned cases is sustained by this Court in numer-

ous decisions. See Union Pac. RR. Co. v. Chicago R. I. & P. RR. Co., 163 U. S. 564; First Natl. Bk. v. Converse, 175 U. S. 40.

> "But when the contract is beyond the powers conferred upon it by existing laws, neither the Corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws." (Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55.)

The lower Court decided this question of estoppel in a manner contrary to the above decisions of this Court, as well as contrary to its former decisions in Dunn v. O'Connor, *et al., supra*, and in Thompson v. Park Sav. Bank, *supra*.

2. INTEREST RATE. Different States have different laws with reference to interest rates, for instance the District Law is in agreement with the West Virginia Law, the Virginia law and some other states.

> "Interest being the subject of contract, our cases hold that where interest is contracted for at less than the legal rate that rate will control after maturity and judgment as well as before." Pierpont vs. Pierpont, Admr. 71 West Va. 431 (1912).

> "It is error to decree interest at 6% when the agreed rate is less". Morris vs. Bear, 72 West Va. 1, 78 SE. 371.

This is also the law of Virginia as shown in Brooks vs. Roane, 1 Call (Va.) 205; Brent vs. Patten, 1 Rand (Va.) 25.

West Va., did not allow interest on bank deposits until the case of Hoffman vs. Unger (1943) 24 S. E. 2d 911. But Supreme Court of West Virginia did not change the interest rate.

The case chiefly relied on in the Courts below, by Respondent was Stein vs. Delano, 121 F. 2d 975 (1941) in the

Third Circuit Court of Appeals. That Court quotes with approval the author of an article in the Michigan Law Review on the subject of the difference in the interest rates. The Court stated that the logic of the writer, regarded as an authority, "seems unanswerable" and then proceeds to quote from the article thus:

> **"On the other hand when the surplus is sufficient to pay in full the interest due to all creditors, a difference in the rates provided by their contracts is not productive of any unjust equality between them. The rights of one are in no way affected by the amount received by the other. An amount equal to the principal is paid to each. Even where the surplus will not pay all the interest in full, no unjust equality results from dividing it on the basis of different contract rates. The balance remaining due is proportioned to the compensation that each should receive for the use of his money. There is no injustice in computing the proportion of compensation to be received by each creditor on the basis of the rate of compensation for which he contracted."**

"RATABLE" in the National Bank Act clearly refers to all claims proven or adjudicated as they stand on the date of insolvency, without any thought of interest or compensatory damages, American Surety Co. vs. Bethlehem National Bank, 314 U. S. 314, (86 L. Ed. 241) at Page 317 (1941) and other cases there cited. Mr. Justice Douglas in his dissenting opinion at page 320 said:

> "The Majority of the Court was of the view that whatever might be the power of Congress, under the Bankruptcy Clause of the Constitution, the adoption of the bankruptcy rule in Equity would be an invasion of 'prior' contract rights (173 U. S. at p. 146)—an impairment of the obligation of contracts."

This case of Stein vs. Delano, *Supra* arose in the State of New Jersey and grew out of the closing of the New Jersey National Bank & Trust Co. of Newark. The Third Circuit Court of Appeals appears to have relied upon the case of Mayor, etc. of Jersey City vs. O'Callaghan, 41 N. J. L. 349.

354. The New Jersey Court of Errors & Appeals (1879) regarding the subject of interest had this to say:

> **"The subject is necessarily presented under two aspects,—first, with regard to what may be called interest proper; and second, when a rate of interest is taken as a measure of damages. The distribution of the subject is material, the two branches of it being subject to dissimilar considerations. Interest proper arises whenever money is lent or forborne with an understanding express or implied that an equivalent shall be given for its use, and in such case the rate of interest agreed upon or if none such be agreed upon, the rate then existing by law, is, in the absence of any new agreement the rate to be paid until the return of the money * * * therefore, on loans and on forbearances the original rate of interest will rule until the repayment of the money, unless the rate shall have been altered by a new agreement between the parties. In such cases it is interest and not damages that is to be assessed." Continuing, the Court said, "But when agreements other than those for the loaning or forbearing of money on interest are broken, another and different rule obtains, for in such cases, as well as in cases for torts, damages and not interest, are to be admeasured. When, for instance, goods are sold, on specified credit, and are not paid for at the time stipulated, the contract for sale is broken * * *—the law takes the legal rate as the fair measure of such damages * * *."**

In Rule 30, paragraph 1 (Rules of this Court), appears the following:

> "Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the Courts of the State where such judgment was rendered."

This Rule follows the law as enacted by the Congress for National Banks in regard to interest rates. Why depart from this rule? The law of the District is *perfectly plain* regarding interest rates, as shown on page 14 of our first

brief. Sec. 28-2701 of the D. C. Code of 1940 provides for six per cent,

> "in the absence of express contract as to such rate of interest."

By *express contract* the demand or commercial deposits were not to receive any interest. (See Rules and Regulations R., page 27.)

Sec. 28-2707 of the D. C. Code of 1940 provides that in an action to recover a liquidated debt,

> "on which interest is payable by contract or by law or usage, the *judgment* for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the *contract*, if any, until paid."

These are plain words with plain meanings. The Statute does not say "except banks" or "except Building Associations" or except anything else. The Statute is plain and applies to all alike, for otherwise it would have been discriminatory. The fact that other banks have paid interest in excess of the contract rate is certainly no argument for continuing such an unlawful practice, any more than to argue that because 400 solvent banks were wrongfully closed, it is a practice which must continue, right or wrong. Surely this Court in its dignity and learning, should rise above such idle talk. And, if interest is awarded as compensatory damages, there should be some proof of the amount of damages. The prevailing highest interest rate on savings in the District by banks is one per cent (R. P. 55, Affidavit of Petitioner).

Why not obey the law and the Constitution, which we are all sworn to support, if this Court will not assume equity jurisdiction and fix a fair and reasonable rate.

Either Law or Equity should prevail. If the law is to prevail, then it is as already stated, nothing on commercial

deposits and 3% on savings. If Equity is to prevail, then a fair and reasonable rate, according to the authorities cited on pages 20 and 22 of our first brief.

> "The running of interest is suspended where payment is prevented by operation of law." Vol. 7, P. 226, Enc. U. S. Sup. Ct. Reports (1910).

> "It would be *manifestly unjust* to exact interest as compensation, or damages, when the payment of the debt is interdicted." Brown vs. Hiatts, 15 Wall. 177, 185, 21 L. Ed. 128.

> "* * * Interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." Thomas vs. Western Car Co., 149 U. S. 95, 116, 37 L. Ed. 663.

It would be a reflection upon the intelligence of each and every member of this Court to suggest that any member really *believes* that a fair and reasonable rate of interest in the instant case, would be six times the prevailing interest rate paid by banks in Washington which is one per cent (R. P. 55). And it would also be a reflection upon the intelligence of this Court to suggest that any member of this Court really *believes* that by agreement no interest was to be paid on commercial accounts, means 6 per cent after maturity, or that the contract rate of 3 per cent on savings means 6 per cent after maturity, when the law, already cited plainly says that the *judgment* shall include interest at the contract rate, if any, until paid.

We challenge opposing counsel to produce one single case in the entire history of the District of Columbia where the contract rate was ever increased by the Courts before or after maturity. And we challenge them to produce one single case in the history of the District of Columbia where interest was ever allowed when the contract was to the effect that no interest would be paid or received. There is no such case.

In R. R. Co. vs. Harmon, 147 U. S. 290, Chief Justice Fuller, speaking for this Court said:

> "It is conceded that at Common Law judgments, whatever the cause of action, did not bear interest * * *. Judgments bore interest in actions *founded on contract*," (Italics supplied) Sec. 28-2701 (page 14 of our first brief) is, in all legal respects, the same as the act of 1870 (page 18 of our first brief) discussed by Chief Justice Fuller in R. R. vs. Harmon, *supra*.

Neither of these statutes say that *all Judgments* should thereafter bear interest, as stated by Mr. Chief Justice Fuller, but judgments bore interest in actions *founded on contract*. This Court has held that the suspension of the bank renders a judgment unnecessary, which we think is correct. But why disregard the plain letter of the law regarding interest for a bank that was four times solvent? Why penalize the bank for being sound and solvent? Why open wide the gates for wholesale fraud by the Comptroller of the Currency? He can arbitrarily wreck and destroy every National Bank in the United States (as here) if he can double the interest rate and squander the assets of the bank with impunity. This is perfectly illustrated in the instant case.

Respondent admits in his answer (R. P. 17, para. 5) that Sec. 28-2701 of the D. C. Code of 1940 is the law regarding commercial accounts, and that Sec. 28-2707 of the same Code is the law regarding savings accounts.

Respondent, through his Counsel, then proceeds to state that there is no provision for interest after maturity, and therefore the rate after maturity (Closing of the bank) must be 6 per cent. This is not respectable nonsense, as Sec. 28-2707 specifically requires that the *Judgment* (after maturity) shall include interest at the rate fixed *by the*

contract, if any, until paid. We have already shown that no interest is due on commercial accounts, according to the agreement.

3. DUE PROCESS—After Judge Bailey had expressed the View (R. P. 14) in the McKinley High School Bank case, civil action No. 17348 that 6 per cent might be due after maturity, all of us were sure that Judge Letts would hold accordingly, which he did. This Court should not sanction these opinions in direct conflict with the law. Judge Bailey had previously joined Judge Wheat in disbarring Jesse Duke, a lawyer of ability, for criticisms of Judge Letts. We know nothing of the merits of the disbarment. Judge Bailey permitted the former Comptroller to destroy the bank when the record showed perfect solvency. When petitioner suggested by letter to Judge Bailey that in view of his former action in permitting the bank to be destroyed, Petitioner doubted if he would care to preside in the case, but follow the custom of the Supreme Court and stand aside. But he was more determined than ever to do what he did. Comity would prevent Judge Letts from rendering an opinion contrary to the opinion of Judge Bailey. But Judge Letts over the earnest protest of Petitioner ordered the bank building sold on December 23d, 1943, (R. P. 51) at a loss of rent to the amount of $8,500 per annum. Certainly he had determined then and there to decide the instant case against Petitioner or he would not have permitted a sale of the Building. He would not have fired the gun unless he meant to kill. It is not unfair to suggest that these two Judges likely conferred and determined to do exactly what they did do.

> "The words of the statute are peremptory and *must* be obeyed * * * but whatever the consequences, we must accept the plain meaning of plain words." U. S. vs. Brown, 206 U. S. 208; 51 L. Ed. 1046.

If any of the statements with reference to Judge Bailey or Judge Letts are not in this record, they may be found in the record or in the briefs in the Court of Appeals, of which this Court may take judicial notice.

The following few lines from a letter of petitioner to Judge Bailey will show he permitted the destruction of this bank:

> "You also held that the Comptroller's position that the depositors and not the stockholders, under the plan submitted, would be furnishing capital 'to the extent of about $150,000', 'So far as liquid or available assets were concerned,' was not subject to criticism though their own Examiner, Mr. Wm. M. Taylor, had stated that the non-liquid or criticised assets had a value of about $270,699.52 arrived at in this way, as testified by Mr. Taylor:
>
> | | *Good* |
> |---|---|
> | Slow $235,188.32, of which 10% or 20% is not good | $188,150.52 |
> | Doubtful $165,099.78, of which 50% is good | 82,549.00 |
> | Total Good | $270,699.52 |
>
> All this appears in the testimony of Mr. Taylor, page 144, Vol. 3, Friday November 10th, 1933, Cooper vs. Woodin, Equity No. 56143, and Mr. Taylor's statement of assets and liabilities, same case, Vol. 2, Thursday November 9, 1933.
>
> Then on pages 144 and 145 Vol. 3, Same case and same date (Nov. 10, 1933) Mr. Thomas, my Attorney, attempted to develop this situation when you said:
>
> Q. 'Is not that simply a question of addition?'
>
> Mr. Thomas: 'I think so, your Honor.'
>
> The Court: 'I do not think you should take up time on that then.'
>
> Mr. Thomas: 'All right, I withdraw it, your Honor. That is all.'
>
> Right then and there it is clear that I lost the case, when these non-liquid assets could have been used and should have been used for the $150,000.00 of Capital and Surplus required by the Comptroller, still leaving over $120,000.00 of these good assets for undivided profits. This is the manner in which this Savings Bank,

> the best bank in the United States, was wrecked and destroyed, though numerous banks all over the Country carry their capital and surplus in the Bank Building or in real estate loans which are usually good but slow or non-liquid."

It would be unnatural to expect either Judge Bailey or Judge Letts to hold otherwise than they did in view of the facts disclosed in this record.

That they were prejudiced and had predetermined what they would do seems a fair and only correct conclusion in violation of the due process clause of the Fifth Amendment.

If the members of this Court are determined to sustain or sanction the violations of the law and the Constitution by the lower Courts, and the violations of the applicable decisions of this Court, which the Petitioner has pointed out, then Petitioner may be wasting his time, but he believes, under the law, that it should be the pleasure of this Court to fairly and impartially give that consideration to the questions presented, to which they are entitled; and that this Court should rise above all prejudice of any kind, whether it be for past criticisms of this Court by Petitioner or for his refusal to submit to the arbitrary and fraudulent closing of this bank by the former Comptroller. Petitioner is helpless and defenseless if this Court is going to use its power to sustain or sanction the arbitrary and unlawful decisions of the Courts below. Indeed "Power should respond to reason none the less because its fiat is beyond appeal."

4. DELAY AND WASTE—This is a question of great concern to the stockholders of every bank in the United States. The lower Courts held that the charges of failing to convert the assets and distribute the cash, as required by law, and the negligent wasting of the assets, as pointed

out by petitioner, were irrelevant and immaterial. There is no record of this Court having ever passed upon these questions. There should be a limit to what the Comptroller may waste and a limit as to how long he may delay the conversion of the assets. The Receiver is the representative of the Comptroller, he is the agent of the Comptroller, who is the real Trustee. In the instant case the failure to convert and make distribution plus the waste in negligently failing to collect interest and pay taxes is equal to a sum in excess of the amount now claimed for interest.

Should this waste and negligence be saddled upon the stockholders or depositors or both, and if upon the stockholders to what extent? How many times may the Comptroller waste and destroy the assets representing the Capital and Surplus of the bank, belonging to either the depositors or the stockholders? This is a question of great importance and should be definitely settled by this Court and not by the arbitrary holding of the lower Courts. Bogert on Trusts (Second Ed.) page 344 says:

> "The cardinal duties of Trustees, are these: (1) To carry out the trust (2) To use care thereabout; and (3) to act in good faith thereabout," citing a number of authorities. Continuing "That the Trustee has not been requested to perform the trust is no defense. He should proceed on his own initiative", citing authorities.

Certainly the Court should determine these questions and not leave them to the lower Courts.

5. *RES ADJUDICATA.* The Respondent insisted that all the facts charged showing that the Savings Bank was arbitrarily and fraudulently liquidated were *res adjudicata*, though he did not point out one single fact charged which had ever before been passed upon on its merits, as the decisions of this Court require. The lower Courts sustained the plea of *res adjudicata* with full knowledge that

not a single new fact had been passed upon by any Court. Petitioner will not repeat these charges as they cover several pages in the record (R. 3, 11) but Petitioner after a general practice of 15 years in Tennessee with an extensive experience, is perfectly confident of a conviction of the former Comptroller of arbitrarily and fraudulently liquidating the bank in the instant case. Of course Petitioner cannot do that, if he is denied a trial on its merits,—a gross denial of justice and a violation of the due process clause of the Fifth Amendment.

If your Honors will take the time to read the substituted counter claim (R. pp. 3, 11) we do not think you will have any difficulty in reaching the conclusion that the intention of the former Comptroller was to wreck and destroy the Savings Bank in the instant case, knowing that it was perfectly solvent. (1) Why did he require $150,000.00 cash (new money) as a condition precedent to the opening of the bank when at the same time he was approving the sale of preferred stock and debentures to the extent of $574,000.00 by other banks? (2) Why did he permit other banks to defer or delay payments of as high as 65%, but refuse to permit this bank to open upon deferring only 35%? (3) Why did he permit other banks to open upon payment of 2% interest, but required this bank to pay 6%? Why did he insist upon suit against the stockholders over the protest of his Receiver, Carter B. Keene, to the extent of a loss of $96,000.00? (5) Why did he refuse to follow the suggestion of his superior, the Secretary of the Treasury to bring in a plan to open the bank? The substance of his answer was his animus toward Petitioner because of previous litigation. (6) Why did he refuse to distribute $775,000.00 cash on hand March 31, 1935, for over six months? Why did he refuse to pay all proven claims ($1,581,340.81) in full on March 31, 1935, instead of restoring $771,000.00 to the

R. F. C. and in refusing to disburse $281,846.96 cash left over after restoring $771,000.00 to the R. F. C. (R. p. 48, Ex. "B"). He could have done this and still have left to restore to the R. F. C. $498,579.42. (7) Why did he refuse to borrow on the assets or sell them at par and pay all proven claims promptly in July 1934, which he could have done? (Affidavit R. pp. 51, 52). We are now referring to the arbitrary refusal to liquidate the assets and pay all proven claims, (not solvency) which would have eliminated practically all of the interest charge. The lower Courts sustained the motion of Respondent to dismiss all these charges as immaterial, irrelevant and *res adjudicata*, though any one of them, unexplained, should convict the former Comptroller of being arbitrary.

There has never been a trial on its merits—

> "The decree, not being on the merits, could not be a bar to such subsequent suit in a State or United States Court", Swift vs. McPherson, 232 U. S. 504, and other cases cited in our first brief P. 26.
>
> " * * * There can be and ought to be no repose of society where for such wrongs the Courts are incapable of giving redress." Graves vs. Faurot, 76 F. 263.

6. IMPAIRMENT OF CONTRACTS. In U. S. v. Amos Kindall, Postmaster General, with which your Honors are acquainted, Chief Justice Cranch quoted with approval Chief Justice Marshall in the old case of Cohens v. Virginia, as follows:

> " * * * with whatever doubts, with whatever difficulties, a case may be attended, we must decide, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to *usurp* that which is *not given*. The one or the other would be *treason* to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them."

In Marbury v. Madison (1 Cranch 163) the Supreme Court said,

> "The very essence of Civil Liberty certainly consists in the right of every individual to claim the protection of the laws * * *."

We have here, right in the beginning of this question of interest, Mayor, etc. v. O'Callaghan, 41 N. J. Law, 349, 354 (1879), *supra*, a clear-cut and clean exposition of the law and a differentiation between *interest and damages*, the contract interest rate prevailing until the return of the money, and *damages* being the legal rate, as there is no contract for interest in the case of damages. This seems to be a wise and proper distinction.

Then we have the late case, (1941) of Stein v. Delano, 121 F. (2) 975, Third Circuit Court of Appeals, approving the policy of paying interest at the rate agreed by contract, saying,

> "Even where the surplus will not pay all the interest in full, no unjust equality results from dividing it on the basis of different contract rates."

We also have the statute regulating interest rates in the District, to which reference has already been made, stating that the *judgment* shall include interest at the rate agreed upon by contract, if any, until paid, which is 3 per cent on savings, and nothing on commercial accounts by contract. We also have the opinion of this Court in R.R. Co. v. Harmon, 147 U. S. 290, stating that "judgments bore interest founded on contract."

We have not been able to find a case where the law of the place was disregarded or set aside. New York and Oregon courts followed the law of their respective states and allowed interest at the legal rate on judgments. But here the situation is entirely different. The contract rate here prevails before and after judgment, as it does in Virginia, West Virginia, Iowa and in New Jersey, as Petitioner has already shown. We have not investigated the different laws of the

different states, which is unnecessary as the law of the District controls, as declared by the Congress of the United States. The question here appears to be, will this Court sustain the law or sanction its deliberate violation, and will this Court sustain the Constitution or sanction its deliberate violation at the impairment of contracts entered into?

In Ticonic Bank vs. Sprague, 303 U. S. (1938) (82 L. Ed. 926), at Page 413 this Court said,

> "As the *obligation to pay interest* is not destroyed by the insolvency, and as the rights of the secured creditor in his collateral, *contractual* or *statutory* are likewise unaffected, we are of the opinion that a secured creditor of a National Bank in receivership may enforce his lien against his security, where it is sufficient to cover both *principal* and *interest*, (all italics ours) until his claim for both is satisfied". This means interest according to the *contract rate*. Why not apply the same principle in the instant case and refuse to violate the Constitution in impairing the obligations of contracts?

Conclusion.

This is a peculiar and unusual situation. Not only the stockholders, but also the depositors who are to become the unwilling beneficiaries of this flagrant fraud, generally denounce the liquidation of this bank as unjust and fraudulent, some using violent language and some less violent; and we do not believe that a few dirty dollars in the shape of interest will change their views in the slightest, as most of them have expressed the opinion that 3% is sufficient, in view of the denial of dividends by the stockholders for the protection of the depositors. We here reproduce one short letter from a depositor addressed to Petitioner, dated Feb. 9, 1945:

> "* * * We are very glad to say that we received all of our money and appreciate the fact very much. We

never knew you personally, but we know you must be an honest and real business man, by the way your bank settled up. We also understand that *justice* was not granted when your doors were never allowed to open for business. If ever you need a favor let me know."

It may be unusual, but the depositors have shown a degree of fairness and justice far beyond that of any of our Courts, though sworn to do justice as our Courts are.

Lord Bacon in his *Novum Organum* made this observation:

> "The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these be neglects and despises, or else by some *destruction* sets aside and rejects, in order that by this great and *pernicious predetermination* the authority of its former conclusions may be inviolate."

The foregoing from Lord Bacon seems to be a very accurate description of the action of the lower Courts in this case, especially in urging that *judgment* does not mean after maturity.

> "The words of the Statute are peremptory and must be obeyed * * * but whatever the consequences, we must accept the plain meaning of plain words." U. S. vs. Brown, 206 U. S. 208; 51 L. Ed. 1046.

Stripped of every other question presented except the question of the rate of interest, if any, this Court should find no difficulty in following the plain letter of the law, as enacted by Congress, as to interest.

Pope Pius XII gave a vivid description of the manner of the treatment of the rights of the stockholders in the instant case when he declared in a Christmas message some time ago:

> "They can be denied, overlooked, despised, transgressed, but they can never be overthrown with legal validity."

Petitioner has always considered himself just a Trustee for whatever he acquired in the nature of assets. He has, in the past, aided in excess of 500 young men and women in securing an education. He here reproduces a little tribute on the fly leaf of a book by Jesse Stuart, his first book "Harvest of Youth" in 1930. Addressing Petitioner, he says:

> "Allow me to present you with a copy of my first adventure. I am one of the boys of Lincoln Memorial who received a scholarship from you. You made it possible for me to finish college. Oh, for a better world of better men like you."

Petitioner is a devotee of our immortal Abraham Lincoln, and as a result, for years he has been a Trustee and Vice-President of Lincoln Memorial University, near Cumberland Gap, Tennessee, on the line of the Blue and the Gray, where he has endeavored to assist, in a modest way, the boys and girls of the hills and mountains, in addition to assisting others. He does not feel that he is an outlaw for opposing such an arbitrary act of injustice as is shown in the instant case. This Court should recall the rebellion at Runnymeade, the battles of Lexington, Bunker Hill and Yorktown, and not forget the heroic sacrifices of Wycliffe, Wallace, Bruce and Sydney, and the battle cry of Emmett, O'Connell and Grattan. Resistance to tyranny is obedience to God.

Respectfully submitted,

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I hereby certify that the foregoing petition is filed in good faith and not for delay. WADE H. COOPER.